STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	
	)	Docket No. 01-0539
Implementation of Section 13-712(g)	)	
of the Public Utilities Act	)	

REPLY BRIEF ON EXCEPTIONS OF THE

ILLINOIS RURAL COMPETITIVE ALLIANCE

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The Illinois Rural Competitive Alliance (the IRCA), by its attorneys O'Keefe, Ashenden, Lyons and Ward, pursuant to the schedule adopted by the Administrative Law Judges, states as follows for its Reply to the Exceptions filed by the Illinois Commerce Commission Staff ("Staff"), Citizens Telecommunications Company of Illinois ("Citizens"), and Verizon North, Inc. and Verizon South, Inc. ("Verizon").

I. THE IRCA SUPPORTS THE ICC STAFF'S PROPOSED MODIFIED PART 731.610(b)(4) RELATING TO THE PERIOD FOR LEVEL 2 CARRIERS TO PROVIDE DIGITALLY CAPABLE LOOPS.

On May 23, 2003, Staff of the Commission submitted its brief on exceptions to the Administrative Law Judges' proposed order (the Proposed Order). Thereafter, on June 2, 2003, the Staff submitted its errata to its exceptions, which incorporated a specific modification to Section 731.610(b)(4), changing from 14 to 8, the number of days Level 2 Carriers would provide a conditioned, digitally capable loop to a requesting carrier.

The IRCA supports the comments and proposed modifications suggested by Staff, and requests that the Commission modify the proposed order and Section 731.610(b)(4) to reflect an 8-day period to provide digitally capable loops. Staff correctly notes that the parties to the proceeding participated in significant collaborative effort before Staff recommended its 8-day

period for provisioning digitally capable loops. As a direct result of this collaborative effort, Staff proposed an 8-day period to provision digital loops, and this proposal was supported by Gallatin River, a Level 2 carrier that will be subject to Code Part 731. ((McClarren, Staff Ex. 7.0, p. 18-19; Gallatin River Initial Brief, p. 2.) If Gallatin River believes it has the capacity and ability to provide digitally capable loops within 8 business days, the Commission should adopt that period as the performance measure for Level 2 carriers. Moreover, even Citizens' acknowledges that there is "no basis in the record for a 14 days standard . . .." (Citizens BOE p. 6.)

Citizens also argues that the Commission should adopt a rule that imposes no deadline for the provision of digital loops, and that the period be determined by the Level 2 carrier on "an individual case basis." (Citizens, pp. 5-8.) The Commission should reject this proposal. Citizens' proposal is vague and ambiguous and in reality imposes no performance measure whatsoever. Citizens' proposal sets no standards by which a Level 2 carrier would determine when loops would be made available, and imposes no restriction on when loops must be provided. Under Citizens' proposal a Level 2 carrier could determine on an "individual case basis" to not provide a loop for 365 days, and still meet their standard. The Commission should reject Citizens' proposal.

There is no reasonable basis for the Commission to adopt 14 days as the period to provision digital loops; there is certainly no basis for the Commission to adopt Citizens' proposal to provide loops on an "individual case basis." Staff witness McClarren testified in support of the eight-day standard for conditioning unbundled local loops. The language for this standard was actually *proposed* by a Level 2 carrier. Tr. 515. Citizens, on the other hand, has produced no evidence that it cannot comply with the performance measure recommended by Staff, or that

the 8-day performance measure is unreasonable. In addition, Section 13-801 of the Illinois Public Utilities Act provides a default period of "5 business days for the provision of unbundled loops, both digital and analog" [1] 220 ILCS §5/13-801(d)(5). Certainly 8 business days to provision a digital loop is not unreasonable when the Illinois legislature has found that such loops can be provided within 5 days.

The IRCA requests that the Commission adopt Staff's proposed Section 731.610(d)(4).

II. THE COMMISSION SHOULD ADOPT STAFF'S PROPOSED MODIFICATION TO THE ALJS' PROPOSED RULE TO ENSURE TIMELY COLLOCATION (SECTION 731.610(b)(1)(D)).

Section IV(g) of the ALJs' Order addresses Section 731.610(b)(1)(D), the performance measure for a Level 2 carrier to provide collocation. Staff's initial proposed rule required that Level 2 carriers provide collocation within 90 days from the date that an accurate service request is delivered to the Level 2 carrier. The Proposed Order modified Staff's recommendation by adding that the 90 days begins to run after the Level 2 carrier provides "an affirmative written response . . . as to the terms of collocation." This additional language inserted by the ALJs in effect eliminates any performance measure for Level 2 carriers. The IRCA agrees with Staff that the language added by the ALJs to Section 731.610(b)(1)(D) be eliminated. (See Staff BOE pp. 20-21.)

As Staff notes, the additional language puts into the control of the ILEC the complete discretion to determine when to provide an affirmative written response, and thereby "grants to Level 2 carriers the ability to unilaterally delay a requesting carrier's entry into the Citizens' local territory market." (Staff BOE, p. 21.) The argument raised by Citizens that it is faced with a "Hobson's Choice" of choosing between 2 unacceptable options is a fallacy. If Staff's proposed rule is adopted, a Level 2 carrier would have 90 days to provide collocation. The date

[1] Section 13-801 imposes obligations on carriers subject to an alternative regulation plan.

would begin to run from the time that the CLEC would serve notice on the Level 2 carrier of the request. During the ensuing 90 days, the CLEC and the LEC would reach an understanding as to the cost of collocation, and arrange for the proper payment by the CLEC of the costs of collocation. And, as Staff notes, if there is a failure to pay by the CLEC, the Level 2 carrier would have the existing options (whether by Interconnection Agreement, tariff, or otherwise) to enforce their rights to collect. The ALJs' Proposed Rule does not actually solve the collection problems posed by Citizens, it merely gives Citizens an uncheck opportunity to delay the provision of collocation. The IRCA supports Staff's proposed exceptions language at pages 60 – 61.

III. THE COMMISSION SHOULD REJECT CITIZENS' PROPOSED MODIFICATIONS.

The fundamental premise underlying Citizens' objections to the Proposed Order is its conclusion that it believes that there is an "absence of any evidence regarding competitive carriers experiencing problems with the provisioning or repair of wholesale services by Level 2 Carriers and the low volume of wholesale activity that has occurred to date for Level 2 Carriers . . .." Because Citizens believes there is a lack of competition in its territories, Citizens asserts that "there is no regulatory need to establish extensive and potentially unachievable wholesale service quality standards" for Level 2 carriers like Citizens. (Citizens' Brief on Exceptions, hereinafter Citizens' BOE, p. 2.)

The Commission should reject out of hand Citizens' arrogant argument. First, it is factually incorrect. The evidence is that competition is developing in the Level 2 markets that justify, indeed require, the Commission to impose wholesale service quality measures on Level 2 carriers, including Citizens. Three of the IRCA members currently have interconnection agreements with Citizens. Tr. 433. Even Citizens' own witness Kenneth Mason admits that in at

least 3 "of the territories served by Citizens in Illinois . . . there is ***substantial*** penetration by competitive local exchange carriers in those territories." Tr. 134. In these territories, CLECs are now serving over 50% of the customers in these territories. The first premise underlying Citizens' objections to Level 2 performances measures is contrary to the evidence. There is indeed developing competition in Level 2 markets, and the Commission should adopt rules requiring Level 2 carriers, including Citizens, to provide wholesale services at certain minimum requirements.

Second, even assuming there is nascent competition in Citizens' territory, the Commission should adopt performance measures for Level 2 carriers precisely to promote competitive entry into these territories. Section 13-712 of the Illinois Public Utilities Act provides that "[t]he Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules." 220 ILCS 5/13-712(g). In accordance with this legislative directive, the Commission initiated this proceeding to establish rules to regulate the quality of interconnection services among telecommunications carriers to ensure quality services are provided downstream to retail customers. Citizens' proposals should be rejected because the premise on which these proposals are based is factually inaccurate.

A. The Commission Should Impose a Performance Measure to Promote Advanced Services in Level 2 Territories.

Citizens requests that the ALJ's proposed rule be modified to eliminate a wholesale service standard for the high frequency portion of the loop. In support of its recommendation, Citizens cites the Commission to the February 20, 2003 press release from the FCC. (Citizens BOE, p. 3.) According to Citizens the FCC's press release makes it "uncertain" whether the FCC will continue to compel incumbent local exchange carriers to provide line sharing. Based

on this, Citizens asserts that the Section 731.605(b)(4) should be modified to eliminate the performance measure to provide the High Frequency Portion of the Loop. The Commission should reject Citizens' argument, and adopt the proposed rule Section 731.605(b)(4).

The Illinois legislature has already declared it a policy under Illinois law to provide line sharing and to provide the HFP Loop as a network element. 220 ILCS 5/13-801. In fact, the Illinois legislature deems the provision of the HFP Loop as a network element so significant, that it requires SBC to provide the HFP Loop within 1 business day for at least 95% of the requests. 220 ILCS 5/13-801(d)(5).

In addition, even assuming that the FCC determines as a matter of federal policy that the HFP Loop is not required to be provided (a matter that is still uncertain as of the writing of this brief) the FCC's press release acknowledges that the HFP Loop will continue to be a network element for at least three years. (See Citizens BOE p. 3-4.) The Commission should reject Citizens' recommended change to Section 731.605(b)(4).

B. Citizens' Desire to Allow Interconnection Agreements to Modify The Performance Measures Is Already Included as Part of the Rule.

In the proceeding before the ALJs Citizens had asserted its position that the Commission should allow the performance measures for Level 2 carriers to be modified through negotiations for an Interconnection Agreements with the Competitive Local Exchange Carriers. In part because of Citizens request, the Staff proposed Section 731.630, which provides that parties may include performance measures in interconnection agreements negotiated after the effective date of the new rules. In addition Section 731.630 provides that the performance measures contained in the new rules will apply to existing Interconnection Agreements, and that if parties wish to modify their existing interconnection agreements to reflect performance measures other than those contained in the rules, they may do so.

Citizens now objects to Section 731.630 on the theory that the Commission may not, by rule modify existing Interconnection Agreements to impose performance measures even where an existing agreement does not have performance measures and remedy plans in place. (Citizens BOE, p. 9-11.) In support of this argument, Citizens cites to the cross examination of the IRCA witness Jason Hendricks where Citizens attempts to make the point that a Level 2 carrier would not be subject to performance measures if it has an interconnection agreement already in place with a CLEC. (Tr. 440- 444.) Citizens relied upon the interconnection agreement between Citizens and Diverse Communications, a CLEC that offers services in Citizens' territories. The interconnection agreement between Citizens and Diverse contains no performance measures or remedy plans. See ICC Docket No. 01-0670, Petition and Proposed Agreement, filed October 29, 2001. The examination by Citizens' counsel of Mr. Hendricks adds nothing to the policy question posed to the Commission of whether it should adopt a rule to impose performance measures on CLECs where the CLECs do not have the benefit of performance measures contained in interconnection agreements. If the Commission were to adopt Citizens' proposed modification to Section 731.630, none of the performance measures adopted by the Commission for Level 2 carriers would apply to CLECs with an interconnection agreement.

Citizen's proposed modification to Section 731.630 should be rejected. The performance measures proposed by the ALJ for Level 2 carriers have been formulated under Section 13-712 of the Illinois Public Utilities Act, and apply to all CLECs, even if a CLEC has an existing interconnection agreement. CLECs that do not have performance measures and remedy plans already in place need the benefits of these performance measures and remedy plans to provide timely and quality services to their end user customers. Section 13-712 is not preempted by the process by which parties negotiation interconnection agreements.

C. Citizens' Does Not Offer a Performance Measure Proposal That Can be Implemented.

Citizens asserts that Section 731.610(b)(1) be modified to reduce the level of performance to provide network elements. Citizens claims that it is discriminatory to apply a 100% performance standard against Level 2 carriers, while allowing Level 1 carriers such as Ameritech and Verizon to be subject to performance standards of 90% or 95%. (Citizens BOE, p. 11-12.) Citizens then recommends that the proposed rules be modified by simply adjusting the measures from 100% down to 90% or 95%. (Citizens BOE, p. 15-16.) Citizens' modifications should be rejected; these

Citizens is correct in some respect that Level 1 carriers are subject to different performance measures than Level 2 carriers. Level 1 carriers are subject to countless (perhaps more than 150, (Direct Testimony of Ameritech witness James D. Ehr, line 305 and Direct Testimony of Verizon witness Louis Agro, line 286)) performance measures, most with self-executing penalties for performance failures. Section 735.315.00 Citizens and Level 2 carriers are subject to performance measures only 6 services: loops, interconnection trunks, resold services, collocation, line loss notice, and customer service records. It is doubtful that Citizens wishes to be subject to the approximately 160 performance measures, reporting requirements, and remedy plans that apply to Ameritech.

Citizens' argument that it is being discriminated against because it is subject to 100% standards ignores the central reason why the ALJ rejected Citizens' argument in the first place. Citizens had proposed that it provide performance at 90% or 95%, but never identified how those percentages would be calculated, or how CLECs would ever know if a Level 2 carrier was in violation. The Ameritech and Verizon performance measures, with complicated formulae, auditing requirements, and reporting requirements, measure an ILECs performance across a

broad number of CLECs over different periods of time. The problem with Citizens' proposal, however, is that it would make it impossible for any one CLEC to know whether a Level 2 carrier failed to comply with the Commission rules with respect to their own service orders, and unlike Ameritech and Verizon, there is no regulatory mechanism created by the rule to enforce the requirements.

The IRCA witness Jason Hendricks testified succinctly why Citizens' proposal was rejected:

> For example, under Citizens' proposal, Level 2 carriers would have to provision 90% of *total* unbundled loop orders within 5 days. Suppose two CLECs each ordered 50 loops in one-month period. Assume CLEC A received 40 of its 50 loops within 5 days and CLEC B received 49 of its 50 loops within 5 days. Under this scenario, the Level 2 carrier is obligated to pay remedies because it only provisioned 89% ((40+49)/100) of its loops within 5 days. But to which CLEC would the remedies be paid? Would the remedies apply for all 11 loops that weren't provisioned on time or for only the 1 loop that caused the Level 2 carrier to miss the 90% standard? And again, if the remedies only apply to 1 loop, which CLEC gets the remedy? Citizens has not addressed these issues so the full ramifications of its proposal are unclear. Suppose also that CLEC B received all 50 of its loops on time while CLEC A still only received 40 loops on time. Under this scenario, the Level 2 carrier would not be obligated to pay remedies because it would have met the 90% *total* standard despite the fact that CLEC A would have only received 80% of its loops on time. So, despite the poor service quality it received, CLEC A may only receive a remedy if the wholesale service quality provided to another carrier was just bad enough to put the total performance below the 90% standard. But even then, it is not clear under Citizens' proposal whether CLEC A would ever receive a remedy for a Level 2 carrier's poor performance.
>
> In addition, as I mentioned above with respect to the threshold proposal, if Citizens' suggestion is accepted, no one CLEC could ever measure whether Citizens' is living up to the quality standards. Citizens' could comply with the performance measure [90]% of the time for one CLEC, but that CLEC would not know whether the quality standard was met, because only Citizens would have knowledge of what their aggregate performance is for all CLECs. Citizens' proposal would make it impossible for any CLEC to know, based on Citizens' performance in processing that CLEC's order, whether Citizens is complying with the ICC's rules.

(Hendricks, IRCA Ex. 2.0, p. 12-13.)

Citizens claims that it is being discriminated against and proposes to modify just the percentage of the measure. If the Commission adopts Citizens' proposal it would also have to completely rewrite the rules for Level 2 carriers to implement an entire series of additional rules and regulations outlining the auditing, reporting, and record keeping requirements for Level 2 carriers. The Commission should reject Citizens' proposed modification to Section 731.

IV. VERIZON'S SUGGESTION THAT ALL CLECS BE SUBJECT TO LEVEL 2 CARRIER STANDARDS SHOULD BE REJECTED.

Any proposed regulatory rule or statute should be flexible, objective, and allow changing circumstances to also modify how a carrier is subject to the obligations. The ALJs' Proposed Order does exactly this with respect to the performance measures for Level 4 carriers. Verizon's Brief on Exceptions takes issue with the Proposed Order's creation of performance measures for Level 4 carriers. The Proposed Order, consistent with Staff's proposed rule, adopts performance measures for Unbundled Loop Return, Line Loss Notification, and Customer Service Records for Level 4 carriers. However, Verizon asserts that Competitive Local Exchange Carriers (CLECs) should be held to the same performance measures and standards as Level 2 Carriers. (Verizon BOE, p. 28.) Verizon's argument ignores the flexibility of the proposed rule, and the ability of the Commission to impose the Level 2-carrier measures if 1) the CLEC begins providing wholesale services to another carrier and 2) if the Commission deems it feasible and necessary given certain criteria. Verizon's argument ignores Section 731.820 and the Commission should adopt the ALJs' Proposed Order.

Under Section 731.820, Level 4 carriers that receive a bona fide request for wholesale services will "become subject to ***all of the Level 2 requirements*** established in Subpart F" after a Commission hearing to investigate the feasibility of imposing Level 2 requirements on the

carrier. Section 731.820 permits Level 4 carriers to compete and develop into what is truly a local exchange carrier providing local exchange services on a ubiquitous basis. Once a carrier evolves into a truly competitive carrier that begins to provide wholesale services to other carriers, the rule contemplates a transition by that carrier into the additional regulatory requirements that befit a carrier providing wholesale services.

Notably, the other Level 1 and Level 2 incumbent local exchange carriers in this have not supported Verizon's position. SBC does not, in its prior briefs or in its initial exceptions, adopt Verizon's proposal with respect to Level 4 carriers.[2] (See SBC BOE, pp. 24-30.) While SBC believes the penalties imposed on Level 4 carriers should be strengthened (a proposal that the IRCA opposes), SBC only suggests that a measure be added for local number portability. CTC also does not support Verizon's argument that all Level 4 Carriers be subject to Level 2 standards. The Commission should reject Verizon's position and adopt the ALJ's Proposed Rule.

[2] The IRCA cannot predict the arguments that SBC may make on reply, and it is possible that SBC may agree with Verizon in its Reply BOE. However, the fact that SBC has not adopted Verizon's recommendations in any prior phase of the case, is a statement that there is a lack of support among the incumbent local exchange carriers to support Verizon's position.

CONCLUSION

Wherefore, for each of the foregoing reasons, the Illinois Rural Competitive Alliance requests that the Commission adopt the Administrative Law Judges' Propose Order and Proposed Rules, with the exception of the rule that sets the period that Level 2 carriers are required to provide loops. As to that Section 731.610(d)(4), the IRCA supports Staff's Proposed amendment to change the period from 14 business days to 8 business days.

Respectfully submitted,

THE ILLINOIS RURAL COMPETITIVE ALLIANCE

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